Zama
Zamdela Taxi Association

Sasol One: EH Marshall and AM Human 6 September 1993 and
(also oral evidence, Welkom 24 September 1993)

Annexure B of 1/11/20/69
Sasolburg High School
Principal – DP Steytler 7 September 1993

"Graag wil ek nadat ewk met skoolhoofde in die Sasolburg streek gesprek gevoer het die standpunt stel betreffende volgehoue insakeling by die OVS."

Die Kultuurraad van Sasolburg 2 September 1993
Annexure C of 1/11/20/69

"... Sasolburg by die OVS in te skakel dis enigste alternatief want as ons by die PWV gebied ingeskakel word sal ons in stemvrepende in dis woestyn wees en verswerg word deur die massas".

Northern Free State Regional Services Council 3 September 1993
Annexure E of 1/11/20/69

"Die standpunt van die streeksdienste raad is dat Sasolburg vir die Noord Vrystaat streeksdiensteraad behou moet word". (p1)

"Bogenoemde redes behoord voldeonde te wees om Sasolburg in die OVS te hou, waarby dit al die jare was, maar as daar enigsins nog twyfel is moet ek vir u se – die Vrystaters het ’n kultuur van sy eie". (p4)

Kim Le Roux Hoof Uitveorende Beampte
Written and oral evidence 21 September 1993

"Tot die beste voordeel van dei gemeenskap van Sasolburg, asseblief hou Sasolburg in die OVS en dit vra ek as inwoner van Sasolburg".

Town Council of Sasolburg 8 September 1993
Annexure 11 of 1/11/20/69 (p1)

"... the Sasolburg Town Council had a convention with representatives of all interested par ties
on Tuesday, 7 September 1993. During this convention it became apparent that the majority present were in favour of the inclusion of Sasolburg in the Free State region..."

Submission 1/11/20/71 and Oral evidence

South African National Civic Organisation

SANCO OFS REgion – September 1993 at Welkom

"Firstly, the Sasolburg community feels strongly that they should remain in OFS, they have been part of the OFS".

Volume 8

Submission 1/11/20/73
City of Bloemfontein also oral evidence in Welkom 21 September 1993

Pg 2 " It must be further pointed out that a large portion of the present Bophuthatswana state is
situated within + 12 000 commuters travel from this aarea on a daily basis . The
Boputhatswana gorvernment has by see this area as a small "Israel" If the expectations of the
peoples should be adrresed, it means that Boputhatswana should be part of this region;; The
Boputhatswana State refer Anneture B of 1/11/220.73.

Pg 9 Die afdeling van die sentrale regeting word in Bloemfotein rerteenwording deur ’n reeks
streekkantore waarvonder.

L Administasie /Raand van Veerteeenvoording.

2 Administasie volskraand : min??7???
verteenwoordiger (ontougs rerval)

3 Geeoudkendienste en weslyn

4. Landbou Outwikkileng

5. Glen landbou kollege

6. Landbou – voorligting

Â£ Onderwyss en kuituur

8. Plaaslike Bestuur Behuislug en werke
9. Appel hof

10. Agief (Nationale Opvoeding

11 Binnelandse sake : Indentifesdokumente geeboortes, sterftes en huwelike
12, Waterwese en Boshou

13. SA Kommunikasiesiens

14. Streeksoutwikkling

15. Finansies – doegie en Aksgging

16. Kantoor vir streckontwikkling (dese
17. Kantoor

18. Hooge regshof

Refer further to pp
P20,21,22,23,24,25,26,27,28,29,30, 31 to complete the list also oral evidence
submission 1/11/74 21 September 1993.
Die vovoss staan ’n sentral suid Afrikaanse streek voor met greuse sosso in bylae 3 onderge tton
(P1).

Die voorrgestelde streek bestaan uit die volgende streeek en substreekdele!

Sreek C ; substreke (s0??? 29 Ingestote Qwa Qwa, 30 en 31 Thabazibmi

Streek J ; substreke (SDPs) 22,23,24 Boputhatswana: Molopo, Ditsobotla, Lehurutshe, Madikwe, Mankwe, Bafokeng Odi 2

Stree H : Sasolburg
Bophutatswana, Odi 1 Moretele.

Veredere omvangryke northrelingd wat bogendemde grense ondersteuin is ook vervat in die volgende dokumente vervat reeds aan die afbakening skommissie voorgele is en word gevolglik nie hethaal nie (P2)

_ Streek afbakening vir Sentrale Deekstaat in ’n nuwe staatkudige bedeling vanuit ’n OVS Provinsate Administrasie perpektief.

– ’N Agrond wetlike streeksbedeling ’n Orage Vrystaaste Perspekties opgestel deur SDAK streek G

– The SAtswa Innitiative

– Nasionale streeksontwikkingadwesraad (N SOAR): voorstelle vir tookomstige streekgeurse.

Refer further to :

Annexure 1 and

Annexure 3 (map)–

Dissritikesoutwikklings vereniging – vrystaat groudvelde: kommentaar aan afbakenigs kommissie saam met vgx outwikkilings sentrum 121 September 1993.

In streek C ie die suid –sotho groep streek teenwoording en in streek J die Tswana groep alhhowil dit nie eeu geval dominant is nie Aangesien die Suid Sotho en Tswana tale basies wedersydks.

Volume 8 submission 1/11/20/79

Thaba ’Nchu Taxi Association

" In the North Wesst Region the majority of occupants are Tswana (75%)

The Orange Free State represents (60%)

Tswana and (40%) Sotho. It is likely that such a region Satswa No 3 ) as planned can succee d
as these two tribes and their cultures are very such same"

(P1)

"In the case of Organge Free State being included in this region it will be definite that l aw and
order will be implied by thecurrent infrastructure to spread the wings of peace, stability and
proseperitry.

(P2)

Such a region will contribute tremeousouly to the welfare and futare of these common like cultures and beliefs to ensure immediate growth"

(P2)

Submission 1/11/20/80 Volume 8

CMK Seape Tswana Farmer
Prefers Satswa option 3
Northern Free State Regional Serrvices Council .

Volume 9 submission 1/11/20/81

" The preceding exposition furnishes conclusive proof that the Sasolburg district should re
main,
as it always has been, on integral part of the administrative region that encomposses the
Northern Free State because of inter alia:

The close economic, cultural and other ties between the people and undertakings of the
Northern Free State and Sasolburg

(P10)
Volume 9 submision 1/11/220/83
Dikwankwetla Party of South Africa 23 September 1993.

P5 (3.3) Conlusion

3.3.1 The submission of the Northh West and Free State region into two separate regions run
s
against all logic in terms of the criteria applied and is also contrary to the views of key
stakeholders in the people living in this region. It is yet aginst strnghning ethical, phys
ical and
historical boudaries at the cost of logical funtional criteria of grouping together what be
longs
together??

P6 (3.3.3)

It is firmily belived that the proposals of the Qwaqwa Demarcation Committee of the
Dikwankwetla Party to the Commission deserve further consideration, as well as motivated
reponse for the basis of the Commissions recommedations only a scientific analysis of facto
rs,
facts and submissions made will lead to a proper, functional and viable demarcation of the
country into regions??

Oral Evidence and Written

Submissions Hartwater 28.09.93
Submission 1/11/20/89 Volume 10

P2 (4) Culture and Language

Historically the first occupants and inhabitants in the area in question were the Botswana
and are
predominantly still the Botswana.

The few white settlers only came to this area in 1801. It is the desive of the chief in
Kudumane, Ganyesa and Taung that their people should not be divided.

P2 (5) Development Potential

The area is almost unlimited in view of the great iron are deposits and stock farming which
can
only reach fruition if Kuruman and Postmasburg remain part of the "North West" region.

Submissions 1/11/20/85

".... The option preferred is that Kimberley Kuruman, Postmasburg, Hartswater should remain together and become part of the North- West;;.

This proposal was further supported by submissions 1/11/20/86/71/91/92/93/.

The retention of districs of Kuruman, Postmasburg and Hartswater was further supported by submissions from Bophutatswana Regional Authority, The governor, Churches, Business, Christian Democratic Party, Urban Council, and Farmers.

Volume 11 Submission 1/11/20/106

AR Clark 15.09.93

"Orange Free State: Borders remain. Include Western Transvaal??

P2.

Oral Evidence Pretoria 30.09.93

Odi Moretele

Volume 11 submission 1/11/20/113

Mabopane circuit Educationa Council satisfied with North-West Region.

Submission 1/11/20/114

Bophuthatswana Federated Chamber of Commerce - Odi (bana Ba Kgwele) prefer Satswa option 3

Volume 11 - Odi Region

submission 1/11/20/115
Garankuwa circuit Education Office

Volumell
Submission 1/11/20/115

Garankuwa circuit Education Office
Volume 11
Submission 1/11/20/116

Odi Agicultural Union
Prefers Satswa option 3

Submission 1/11/20/117

Mabopane Urban Council people are satisfied with Norther –West Region.

- Stability is maintained

- People positive participation is decision making

- Submission 1/11/20/118

- Jerrico circuit Education Council

- Satisfied with North –West Region

- There is provision of educational facilities by government

Sasolburg

Submission 1/11/20/122

- MAG workman Kroonstad sakekameer
- Mr Morton – Maokeng city council

- ANC constatia selwewaarts

" The opinion of all the above mentioned is that Sasolburg must fall under the Free State??

Written Volume 11 Submission 1/11/20/123

Submission Municipality of Steynburg

( Die bestuur van die Boere unie en die Municipale Raand Steynburg beru D by hul vorige besluit om by die Vrystaat ingedeel te word??

Oral Evidence WTC 02.10.93

Volume 21 Submissions 1/11/20/204
submission by the SOuth As highliting by the Multi-Party Negotiating Concil September 1993.

* Photocopy pp3 &4 highlihted paragraphs map P1213 scenarioA

Volume 21 submission 1/11/20/203/204
Satswa Council

The Satswa Council

The current status 1993

The Satswa Regional innitiative

An exatutive summary of the current status.

Volume 22 submission 1/11/20/208
Bophutatswana Government– Governments on the report of the Commission on The

Demarcation of Regions.

* Photocopy pp 1–5

Volume 23 submission not numbered
WESP – Wes – Transvaalse Vereniging van plaaslike owersde
Written Submission

" The Western, Transvaal local Authorities – WTLA) would like to suggest that Kgrugerdorp

also be included in the North West Region??

Volume 23 : Odi
Submission 1/11/20/232
Bakgatla Ba-Mmakau Tribal Authority

Volume 24 submission 238
Chief 1 J Nawa

Volume 24 submission 239
Chief Mathibe - Bahwaduba Tribal offer prefer Satswa option 3

Volume 24 submission 1/1/20/240
Thulwe community Authority

" We share common national cofers interests and obejtives hence we do not want to be any other region biside North West"

Refer to pp 1-4

Volume 24 submission 1/11/20/242

Barolong - Ba Lefi Tribal Authority

"... We will be at have in North -West region as prescribed by option 3 of Satswa"

Submission 1/11/20/243
Bakgatla ba Mocha
"On tribally bought land entitles us to remian in North - West region refer to pp1-4

Submission 1/11/20/245
Bakgatla Ba Ga Mosetlha 18 September 1993

"We live in our Tribal land brought we have its tribe dead in our possess we share common gorus and values with other Batswana we do not see reason why we should be separated from them?

Submission 1/11/20/246
Ba - Mokgoko Tribal Authority
19 September 1993

As a nation of Tswana we focus an entity which share same noius and values and we feel at with our fellow Tswana.

Submission 1/11/20/247
Taxi Assoxiation -Temba
We are oppose to commission dermacation

technical.com

# ALTERNATIVE WAYS OF DRAFTING AND ADOPTING

# A NEW CONSTITUTION

## Analysis and interpretation of submissions and proposals.

At its meeting of the 17th June 1993, the Negotiating Council adopted a resolution which enjoins the Technical Committee on Constitutional Issues, in view of the submissions received, to consider and report, inter alia, on:

1.1. "alternative ways of drafting and adopting a new constitution, including the bottom-up and top-down approaches, and
alternative views regarding the need for SPR constitutions and different options for such constitutions".

In our previous reports we have spared no moment to draw the participants attention to the two broad approaches to the constitution making process, which emerges from the parties respective proposals. In particular, in our Second Report we examined the proposals of all the parties and concluded that, barring the confederal option, there are two broad categories or proposals. In the first category, one finds the proponents of a single phased transition who also contend for the Multi Party Negotiating Process ["MPNP"] being the constitution making body. On the other hand, a further category of proposals supports a two-phased transition and the adoption of the final constitution by an elected constituent assembly. As we stated in our Fourth Report, [para. 5.1]. This divergence of views amongst the

participants, is "a difference of substance and not of terminology". In our Second Report we further pointed out that "no significant progress can be made by the parties without a significant resolution of what appears to be mutually exclusive approaches to the

constitution making process".

3.1 In this report we examine more closely, the approach which favours final constitution making by the MPNP and the one stage constitutional transition. Of course, this classification and name-tags may be expedient to describe this approach but are less than accurate. The actual proposals of the parties are complex and entail several steps or stages.

Dol The parties who filed submissions in support of this mode of constitution making process and content are:

3.2.1. Kwa-Zulu Government;

3.2.2: Inkatha Freedom Party;

3.2.3. Bophuthatswana Government;
3.2.4. Ciskei Government, and

3.2.5. The Afrikaaner Volksunie "AVU"

Whilst in broad outline the proposals from these parties have a certain commonness, significant variation of detail of the proposals which are described hereunder would therefore reflect the broader picture. We will however make reference to divergences where relevant or necessary. Hereunder we deal with the features of the proposals

under various headings.

Form of State:

5.1.

These parties argue that the issue of the form of state must be resolved and disposed preliminarily to any determination affecting both the modalities of the process of transformation as well as the constitutional principles to be embodied in any future constitution. A predetermined type of state, that is a federal, confederal, regional or unitary state would condition the process of transformation. Put otherwise, the process of transformation needs to be shaped in order to produce a predetermined type of state. It is consequently argued that a

unified centralised process of transformation, centred around

the notion of a constituent assembly is not likely to produce

the breakdown of the present unitary state into member states organised on the basis of the federal principle. These parties further argue that neither the Technical Committee nor the MPNP should focus on a constitution making body and transitional constitution until the form of state has been considered. To do otherwise "would be to put the process before substance, to permit the fundamental determination on

the substance to be conditioned by the procedural decisions".

The proponents of the preliminary determination of form of state in the negotiating process, advance various reasons for their viewpoint. Such reasons relates, amongst other things to, political expediency, constitutional dogmatics, the determinative relationship between the form of state and the

constitution making process and the component structures of

5.3.

the constitution.

The form of state contended for is described in the following

broad terms:

5.3.1.

5.3.2.

9.4d.4:

A federal system in which "all powers should be
reserved to the region/state while only those
powers which cannot be adequately exercised at
region/state level should be devolved upwards to
the federal government.

Such a form of state should be informed by the

principles of  subsidiarity, residuality and

asymmetry. The notion of subsidiarity requires the
taking of decisions at the lowest possible level. So
to speak, all services and governmental functions
and powers should be handled or exercised by the
lowest level of government capable of handling
such function, powers or services. On the other
had, residuality is a qualification of the notion of
subsidiarity. According to the concept of
residuality only those powers which cannot be
exercised adequately and properly at local level
should be devolved upwards to the federal level.

On this proposal of form of state, autonomous
[sometimes referred to as "independent"] federal
states would come into being as part of the
"Federal Republic of South Africa". Such a federal
system is "intended as a system of splits of

sovereignty between the member states and the

federal government".

It is also argued that a federal system should be established

on an asymmetric basis. Some of the parties hold that it is

conceivable that a portion of South Africa could be organised as a unitary state, that such a portion would entertain a federal relation with one or more regions of the territory

organised as a federal system.

Constitutional transition to a federal state:

The constitutional transition envisaged entails two matters. The first

of these is the constitution making process and the second would be

the transitional process from the existing constitutional dispensation

to the envisaged new constitution or constitutions for South Africa.

The parties who support the prior determination of the form of state,

also support a specified method of constitution making and

transitional process. Hereunder, we set out some of the broad

features envisaged in the constitution making process and transition.

6.1.

The MPNP should determine preliminarily the form of state. No decisions on the constitutional principles, component structures and of the constitution or the transitional process should be made until the form of state has been determined. The MPNP should, in the light of the form of state agree upon constitutional principles which should include entrenched regional borders, and entrenched powers and functions of SPR's.

The MPNP must agree on the demarcation of SPR

boundaries. None of the parties deal with what appears to be the inevitable consequence of such geographic demarcation being the integrity of the existing borders and constitutional authority of the TBVC states.

The agreed form of state, and constitutional principles would be referred by MPNP to a panel of experts who would be instructed to prepare a draft national constitution.

People "at ground level negotiate and determine" SPR constitutions' within each newly demarcated SPR. The method of determination of SPR constitutions vary from proposal to proposal:

6:5.1.

- The Inkatha Freedom Party ["IFP"] and Kwa-Zulu Government ["KZG"] propose that at this stage elections be held in every SPR.

Such elections could be held by April 1994 after which constituent assemblies in each SPR could be brought in to being with a specific mandate to formulate constitutional proposals and to choose representatives to a Federal Council of the MPNP. Armed with a democratic mandate, the SPR

representatives, elected from the respective

constituent assembly, would form a distinct

structure of the MPNP being the Federal Council. In this way the MPNP would become a bicameral structure made up of elected representatives in the

Federal Council and of the present unelected

6.5.2.

delegates in the MPNP. The Federal Council would deliberate in all matters which effect SPR's in the constitution making process directed at the national constitution.

- The bicameral national negotiating forum will debate constitutional proposals and also appoint a constitution making body from its ranks.

- A panel of experts will be requested to prepare a draft national constitution. The experts and the constitution making body will interface to produce a final national constitution.

- No specific reference is made in the proposal to the actual adoption of the SPR constitution. It can, however, be inferred that the SPR constitutions will be adopted by the SPR constituent assemblies before or simultaneously with the national

constitution.

Bophuthatswana proposal:

The Bophuthatswana proposal in this regard is that people at ground level must negotiate and determine the SPR constitution, simultaneously with the drafting of the national constitution by a panel of experts. It is, however, unclear how the people at ground level would negotiate and determine SPR constitutions. Once the SPR and national constitutions have been drafted these would be submitted to

the MPNP for consideration, co-ordination and approval.

6.5.3.

6.5.4.

Ciskei proposal:

The Ciskei too proposes that the SPR's should write their own constitutions. Their proposal provides no specification of how these constitutions would have to be written. The approval and adoption of the constitutions would occur through referenda within SPR or in regional multi-party conferences. Presumably, the approved SPR constitution would be forwarded to MPNP where the national constitutions would be prepared and would give "recognition

to regional initiatives and delegation of powers..... .

AVU proposal:

The AVU also submits that the regional states write their own constitutions. No particulars have been furnished about the processes envisaged for the drafting and adoption of such SPR constitutions.

Once the SPR constitutions have been adopted as proposed hereabove these would be submitted to the MPNP for coordination and synchronisation with the national

constitution.

When the MPNP has approved the national and SPR constitutions a

national referendum will be held to endorse the national and SPR

constitutions.

Thereafter legislative processes would be set in motion to adopt

national and SPR constitutions. This proposal implies that the South African parliament as well as the TBVC legislatures would take all such legislative measures as are necessary to give legislative effect to

the national and SPR constitutions.

Finally, elections at national and SPR levels would take place in terms of a new constitutions. In this regard, the IFP/KZG proposal national elections would be for the "lower house" whereas the already elected SPR representatives could serve as members of the national senate.

In terms of this proposal it would still be necessary to have elections

for SPR legislatures under their own new SPR constitutions.

For the sake of completeness it may be useful to point out that the

aforegoing approach to constitution making and transition:

10.1. rejects the notion of a two-phased transition to a final national constitution;

10.2. rejects the establishment of an elected constituent assembly or constituent making body;
opposes the establishment of any transitional arrangements such as a transitional executive council, elections leading to a constituent assembly, an interim government or the drawing of any transitional constitution;
resists the holding of any election at national or SPR level at any stage before the SPR constitutions have been predetermined by the SPR themselves;
would be against the determination and amendment of the

present constitutional dispensation including that of the TBVC

states prior to the final adoption of a final constitution for the

SPR's and the national constitution.

It is contended by these parties that in this way the constitution making process and transition would be "bottom-up". The process of institution building and transition would commence at SPR level and would culminate in a national referendum and ultimately national elections. This process is seen as being premised on "grass roots democracy" or "bottom-up democracy" as it engages a large number of people at local level to participate in the SPR constitution making process. It may be added that on the IFP/KZG proposal, it is believed that final national elections could be held during or before September 1994. It is, however, noteworthy that none of the other proposals dealt with hereabove propose an electoral process preceding SPR

constitution making.

REPORT ON COAT OF ARMS : H de V du Toit

In principle a new coat of arms should not deviate from norms accepted throughout the international world for coats of arms.

We should have a coat of arms which can be displayed in the world and at home with pride as befits a country of South Africa's stature, age (70 years as an independent country) and developed maturity.

It should conform to the following:

a) Based on a shield

b) Have a helmet and crest

c) Have supporters

d) Have a visual impact not so-called symbolism which in heraldry does not play an important part

Only three coats of arms of those I have examined heraldically and aesthetically qualify. The order in which I prefer them (with alterations as later indicated) are:

a) Example marked 'C'
b) Example marked 'A'

Â©) Example marked 'B'

The figures on the present coat of arms should of necessity be altered as the four provinces are to be discarded. Unifying emblem should replace these. It should be replaced by a single emblem. The protea flower as depicted in 'C' and 'Aâ\200\231" is to my mind very suitable. This is also the case with the sticks in the crest. Perhaps the number six should be altered to seven - a more favourable biblical number. To use the exact number for the different regions could be impractical.

Alterations suggested in example 'C':

Change the gold on the shield to silver

Change the golden sticks in the crest to silver

Change the colours of the leopards to black and white - a more unusual colour combination and in keeping with the Zulu saying "A leopard licks all his spots, both black and white". This fits the South African situation.

TECCOM/DOCUMENTS/SYMBOL.ARM
MARLENE HYND
1 October 1998

TECCOM/DOCUMENTS/SYMBOL.ARM
MARLENE HYND
1 October 1998

The process of eliciting submissions for a national flag should be inclusive in order to ensure representativeness. All the people of South Africa, groups and individuals in both urban and rural areas must be invited to participate. Local leaders should initiate the process. Participants should be drawn from the following kinds of groupings:

Schools

Religious

Cultural organisations
Civic

Local

Youth

Women

Students

Education

Stokvels

Specialist societies (e.g. music, heraldic)

COMMISSION ON THE DEMARCATION/DELIMITATION OF SPR'S AN
INVITATION FOR WRITTEN AND ORAL SUBMISSIONS

The Commission on the Demarcation/Delimitation of SPR's which was appointed by the Negotiating Council of the Multi-Party Negotiation Process on May 28, 1993 has completed it s
report. The report was debated by the Negotiating Council on Monday, August 9, 1993, and a resolution mandating the two Co-Chairpersons, with the assistance of members of the Commission and its Technical Support Team, to carry our further work on "sensitive areas" was passed. This resolution is attached.

SUMMARY OF COMMISSION'S REPORT

The Commission in carrying out its task, took into account the following:

a. The Constitutional Principles agreed upon by the Negotiating Council;

b. The criteria for the demarcation/delimitation of SPR's provided by the Negotiating Council;

e Oral and written submissions made by interested groups and individuals; and
d. Various research information on the subject of regional demarcation.

The Commission received and considered 304 written submissions and heard 80 oral submissions at various centres around the country. Nonetheless, the Commission noted its concern that there was inadequate local community involvement in the process. This was due to
a number of factors such as: (i) the limited time that was allowed to complete the work; (i i) the
lack of capacity of many communities to respond, either orally or in written form; and (iii ) the
limited number of people and organisations that the notification of the Commission's brief was
able to reach.

The criteria for demarcation which the Commission was directed to use are: historical boundaries, including provincial, magisterial and district boundaries and infrastructure; administrative consideration including availability or non-availability of infrastructure a nd nodal
points of service; the need or otherwise to rationalise existing structures (including TBVC States, self-governing territories and regional governments; the necessity of limiting fina ncial
and other costs as much as is reasonably possible; the need to minimise inconvenience to th e
people; the need to minimise the dislocation of services; demographic considerations; econo mic
viability; development potential; and cultural and language realities.

The Commission having taken all the above indicated information into account, recommended that there be nine regions as shown on the map. These regions are: (i) Northern Transvaal, (i) Pretoria-Witwatersrand-Vereeniging, (iij) Eastern Transvaal, (iv) KwaZulu/Natal, (v) Orange Free State, (vi) North West, (vii) Northern Cape, (viij) Western Cape, and (ix) Eastern Cape/Transkei/Ciskei.

TECCOMM/DOCS/SUMMARY .RPT
26 August 1993
FIRST DRAFT

AN INVITATION FOR WRITTEN AND ORAL SUBMISSIONS

In its deliberations, the Negotiating Council members highlighted "sensitive areas", in whi
ch
there is need to obtain further submissions and receive oral evidence. These areas are:

Eastern Transvaal - the proposed borders, with reference to the question of whether this region should include Pretoria, KwaNdebele, Bronkhorstspruit, Middelburg, and Witbank. The position of the Kruger National Park.

Pretoria-Witwatersrand-Vereeniging - whether this region should exclude Sasolburg, Pretoria and the parts of Bophuthatswana located in it. Secondly, whether Pretoria should be located in the Witwatersrand-Vereeniging region.

Orange Free State - whether this region should be combined with the North West region.

Eastern Cape/Transkei/Ciskei - whether this region should be one or two regions and the boundaries thereof.

Western Cape - whether this region should be combined with part of the Northern Cape to make one region.

Northern Transvaal - whether this region should include Pretoria, Groblersdal, Pilgrims Rest, and Hammanskraal. The position of the Kruger National Park.

Northern Cape - whether the northern boundary of the region should include Kuruman and Postmasburg, and whether Namaqualand should be excluded from the region.

- KwaZulu/Natal - whether the Umzimkhulu/Mount Currie area be included in this region.

WORK PROGRAMME FOR COMPLETION OF TASKS

1.

Written submission in response to the above issues are being solicited. Submissions must be received by the Commission secretariat no later than Friday, September 24, 1993.

The following issues should, inter alia, be addressed in the written submissions (6] Region(s) at issue, (ii) name of organisation making submission, (iii) type of organisation, (iv) whether members of the organisation making the submission were consulted and approve of the proposed boundaries, (v) whether they are satisfied with a particular region and reasons to substantiate this, (vi) the degree to which the regions

satisfies the criteria used by the Commission on SPR's.

Kindly send written submissions and applications for oral submission to:

Dr Renosi Mokate (Technical Secretary)

Commission on the Demarcation/Delimitation of Regions
P O Box 307

Isando

1600

TEL: (011) 397-2059/2184
FAX: (011) 397-2211

TECCOMM/DOCS/SUMMARY .RPT
26 August 1993
FIRST DRAFT

Government's present stance regarding the Multi-Party Negotiating Process.

VENDA

Mr SN Mahada, a Senior Law Advisor in the Department of Justice, was seconded and worked together with Mrs Annette Kirk-Cohen and Mr Adriaan Haupt of the University of Venda Law Faculty, who were appointed by the convenor. A report was submitted.

CISKEI

Mr M Bulube of the Supreme Court in Bisho was nominated by the Ciskei Administration. Mr Dumisani Tabata, a practising attorney, was appointed by the convenor. Mr Bulube gave his full co-operation to Mr Tabata and the Task Group.

KWAZULU

In the First Progress Report it was suggested that a sub-group for KwaZulu should also be set up. The Planning Committee accepted this submission and the name of Mr Mtetwa was received from the MPNP Administration as a contact person for the KwaZulu Ministry of Justice. Two letters were telefaxed to Mr Mtetwa, but no response has been received.

The convenor approached Mr Howard Varney, a practising lawyer in the office of the

Legal Resources Centre in Durban, who agreed to co-operate on KwaZulu and submitted proposals. (Did he contact Mtetwa?)

SOUTH AFRICA

The two members of the overall Task Group were supposed to concentrate on South Africa. Mr Danie Brandt, a senior law student who assisted the Technical Committee on Discrimination, was co-opted, especially to work with Mr Du Bruyn (until the start of the exams). Mr Du Bruyn was out of the country between 8 and 23 October. Dr Flip Jacobs of the Ministry of Justice acted as a contact person in his absence.

The different members of the sub-groups started to put together proposals on very short notice, in their respective territories.

On Wednesday 20 October 1993 a meeting took place at the World Trade Centre. The meeting was attended by Prof van der Westhuizen, Dr Jacobs, Prof Heyns, Mrs Kirk-Cohen, Mr Bulube, Mr Tabata, Prof van der Vyver, Mrs Booi, Mr Ntsebeza and Mr Brandt. Draft reports were discussed and compared.

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In view of the difficulties regarding the availability of legislation of the TBVC states, as well as access to the necessary documentation, it was thought best to appoint people to the sub-groups who have been or are active in the relevant areas. Members of sub-groups were asked to go ahead, in order to save time, rather than to have meetings and to work as a committee at the World Trade Centre. Up to now, one meeting of the overall Task Group and the members of the sub-groups has taken place, in order to standardise information and to discuss general strategy. The recommendations of the Task Group are essentially those of the two members of the overall Task Group, with the advice and input of members of the sub-groups. However, at the meeting there was considerable consensus and the presence of some members of the sub-groups with special expertise concerning particular areas, may be useful or essential when reporting orally to the Planning Committee or Negotiating Council.

Technical Committee No 7, the committee on Discriminatory Legislation, submitted several reports between May and August 1993 and followed the following approach:

The Committee found that a comprehensive list of all discriminatory and repressive laws in South Africa, the self-governing territories and the TBVC territories would constitute a useful compilation of statutory enactments, but that repealing or amending these will have to be implemented by 11 different legislative bodies, numerous local authorities and other law-making persons and bodies. The Committee found that the likelihood of obtaining uniformity on non-discrimination and free political activity from 11 different legislative bodies is small. If no uniformity in legislation is obtained, this will inevitably result in discrimination. They preferred a single structure for the enforcement of laws and regulations pertaining to free political activity and equality. Therefore they proposed a "higher code", which was not supposed to be an interim Bill of Rights, but a code prescribing principles for free political activity, free and fair elections and non-discrimination. They regarded such a higher code as a useful measure to set aside any law, administrative act or private activity in violation of the code and was of the opinion that parties taking part in the negotiating process should all be given the opportunity to endorse the higher code. The higher code would have "supreme legal status" and cancel out objectionable provisions in a statute while the rest will remain intact. The Committee thought that the typical characteristics of free political activity in a democratic society include principles such as:

(i) freedom of expression;
(ii) freedom of the press;

(iii) freedom of association;
(iv) freedom of movement;

(v) freedom of assembly; and

(vi) free access to information.
As far as discrimination is concerned, the Committee considered:

(1) discriminatory laws which constitute the foundations of political apartheid,

(ii) discriminatory laws which flow from the above laws,

(iii) laws which are inherently discriminatory and

(iv) laws which may impede free and fair elections.

The Committee relied on the definition of discrimination in Article 1 of the International Convention on the Elimination of All Forms of Race Discrimination of 1965, as well as in Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979.

Laws that may impede free and fair elections, according to the Committee, include any law that may:

(1) deny or interfere with the right to vote;

(ii) deny the equality of treatment of voters in the whole election process from the time of qualification as a voter to the casting of the ballot;

(i) prevent the free exercise of freedom of speech, expression or access to information; and

(iv) deny political parties equal access to voters, to venues for meetings, to the media, to funding resources etc;

(v) interfere with the freedoms of association and assembly (including the right to demonstrate);

(vi) interfere with or deny freedom of the press or media;

(vi) prevent an election from being conducted in accordance with uniform rules for the whole country;

(viii) deny the right to stand for election;

(ix) deny the right to vote freely without fear of victimisation;

(x) deny the right of political parties to canvas voters.

The Committee proceeded to provide a list of discriminatory laws constituting the foundations of apartheid, discriminatory laws which flow from the laws constituting the foundations of apartheid, laws which discriminate on grounds of sex and religion and laws which may impede free and fair elections in the TBVC territories and in South Africa.

The Committee furthermore made a draft "higher code" available.

After some liaison between the Committee on the Repeal of Discriminatory Legislation and the Technical Committees dealing with Elections, with the Transitional Executive Council and with Fundamental Rights, it became clear that there were areas of overlap or potential overlap, especially as far as the idea of a "higher code" was concerned. Some of the principles proposed in the

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higher code would have been included in the Electoral Bill, others in the Interim Bill of Fundamental Rights, etc.

Apparently no further concrete suggestions concerning legislation to be repealed or amended were made and it is not clear to the Task group what the present status of the concept of the "higher code" is.

It would seem that the instructions of the Planning Committee to the Task Group emphasised the need to identify legislation impeding free political activity, for such legislation to be repealed, or amended, on an urgent basis. Therefore the Task Group decided, as a first step, to concentrate on the most crucial aspects of legislation possibly impeding free political activity and discriminating as far as free participation in elections is concerned, in the relevant territories. Therefore lawyers working in the relevant areas, and the representatives of the different administrations, were asked to concentrate on those aspects of legislation which seem to have a very direct and immediate effect concerning free political activity.

In principle the Task Group agrees with the definitions and descriptions, as well as the findings and approach of the Technical Committee on Discrimination, namely the concept of a "higher code" of some kind, and also the immediate amendment or repealing of discriminatory legislation. As a first step, the Task Group is trying to give more substance to the last mentioned leg of the Technical Committee's approach, namely to make concrete submissions as to legislation which has to be repealed or amended in South Africa and the TBVC territories.

It is to be hoped that aspects of legislation identified by the Task Group as impeding free political activity, will indeed receive the urgent attention of the relevant legislatures, after sufficient consensus has been reached in the MPNP. The Task Group was also guided by the rights and principles set out in several international and regional human rights instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Declarations of the Rights and Duties of Man, the American Convention on Human Rights, the African Charter on Human and Peoples Rights and the Council of Europe Convention for the Protection of Human Rights and Freedoms.

At this stage the Task Group has identified aspects of legislation and recommends the substance of proposed amendments. The Task Group has not been mandated to draft legislations in this regard, but could possibly proceed to do so, if necessary.

On the longer term, the Task Group could proceed with the identification of legislation which is inherently or otherwise discriminatory, and to make recommendations in this regard. Obviously future structures such as the Transitional Executive Council, Electoral Commission, Electoral Court and Constitutional Court and the provisions of the Interim Bill of Fundamental

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Rights will have to be taken into account.
As far as local government by-laws impeding free political activity and

discriminating on ground of race, gender, etc are concerned, see paragraph 4 below.

As was the case with the Technical Committee on Discrimination, the Task Group does not regard it as falling within its present mandate to pronounce on the statehood or constitutional position of the TBVC territories. Therefore the constitutional position of the territories is addressed only insofar as it is directly related to specific laws impeding free political activity. In some cases the unconstitutionality of legislation, judged by the present constitution, it is pointed out, rather than expressing an opinion on the constitution as such.

In previous submissions aspects of citizenship in South Africa and the TBVC states were mentioned. The Task group considered this facet, but decided not to go into the issue of citizenship and franchise, in view of the work of the Technical Committee on the Electoral Bill and on Constitutional Principles, as well as their ad hoc committees. Inherently discriminatory aspects of citizenship legislation may be considered in future reports.

On KwaZulu and Self-governing territories

Something on subjective test?

Explain repeal and amend schedule 1 & 2

LIST OF LEGISLATION

A

SOUTH AFRICA

In identifying the relevant objectionable legislation in the Republic of South Africa the Working Group has taken into account the provision of the proposed Regulation of Gatherings Act (popularly known as the Goldstone Bill), the Transitional Executive Council Act, the Draft Electoral Bill and the proposed functions of the Independent Electoral Commission and the Electoral Court insofar as they will repeal or abrogate existing legislation. The following Acts or provisions of Acts are then those regarded as potentially dangerous or inhibiting towards the free political process which are not dealt with in the aforementioned documents and which the working group consequently thinks should be repealed or amended.

Title, No and Year of Particular sections Recommendations

| Law | Summary of Contents and Reasons |
| --- | --- |
| Repeal or Amend | |
| Prohibition of Foreign Financing of Political Parties Act 51 of 1968 | Prohibits the receipt of foreign funding by political parties<br><br>Repeal in toto<br><br>Impedes free political activity and related rights |
| Affected Organisations Act 31 of 1974 | Discretion to State President to declare political organisations receiving foreign funding to be affected organisations<br><br>Repeal in toto<br><br>See (1) |
| Publications Act of 1974 | Section 47(2) permits banning of publications deemed to bring sections of the population into ridicule or contempt<br><br>be prejudicial to the safety of the state, general welfare, peace and good order<br><br>Repeal 47 (2)...<br><br>- could be used to impede free political activity; repeal or |

amend Act as a whole in accordance with Bill of Fundamental Rights

Parliamentary Internal Security Commission Act 7 of 1976

Wide ranging powers to Parliamentary Internal Security Commission

Repeal in toto –

violates several fundamental rights, including access to court, access to information, etc.

Title, Number and Year of

Law

Particular sections Summary of Contents

Recommendations and

Reasons

Repeal or Amend

(5)

Internal Security Act
74 of 1982

Section 50: Power of
police officer to
arrest without
warrant

Section 58, 59, 60:
additional sanctions
and unlawful
behaviour, aimed at
prohibitory civil
disobedience

Section 62:
Prohibition on
causing.....hostility
between population
groups.

Amendment to
subject decision of
police to objective
instead of subjective
test – violates
freedom of the
person

The repeal of these
provisions – violating
freedom of
association,
assembly,
demonstration,
movement,
expression, etc.

Repeal, or amend to
lessen vagueness and
wide scope – violates
freedom of
expression.

(6)

Disclosure of Foreign

Powers to Registrar

Repeal in_toto –

Funding Act 26 of to declare an
1989 organisation a see (1)
reporting
organisation, which
has to disclose

information regarding
funding; also, powers
of search and seizure.
Other Matters
(7) Public Safety Act 3 Grants unfettered Dealt with in TEC
of 1953 power to State Bill; not immediate

President, Minister of
Law and Order to
declare a state of
emergency or an
unrest area
respectively and to
promulgate
emergency
regulations or

problem.

| | | |
|---|---|---|
| | | regulations in an unrest area. Jurisdiction of the courts ousted to a great extent. |
| @Â®) | | |
| Gathering and Demonstrations in the Vicinity of parliament Act 67 of 1976 | Prohibits demonstrations in the vicinity of Parliament | Likely to be dealt with "Goldstone Bill" |
| 9) Demonstrations in or near Court Buildings Prohibition Act 71 of 1982 | Prohibits As above demonstrations in the vicinity of Court Buildings | |
| (10) Gathering or Demonstrations in or near the Union Buildings Buildings Act 103 of 1992 | Prohibits As above demonstrations at the Union Buildings | |

MOTIVATION

(1) Prohibition of Foreign Financing of Political Parties Act 51 of 1968

This act prohibits the receipt by any political organisation of foreign funding for politic al purposes. The Act clearly does not take account of the present political situation, where many political parties or movements do in fact receive extensive funding for political purposes from abroad.

Furthermore, if the Act were indeed to be applied, such application would result in an impediment to the free political process. The Working Group further believes that any regulation of foreign funding by political parties should be left to the Transitional Executive Council or the Independent Electoral Commission. The Working Group consequently recommends that the Act be repealed in full.

Affected Organisations Act 31 of 1974

This Act grants the discretion to the State President to declare any political organisation that receives foreign aid or monies for political purposes to be an affected organisation. An Affected organisation is prohibited from receiving any aid or money from abroad. Such money already in possession of an affected organisation may furthermore not be used for any purpose other than to donate it to a welfare organisation specified by the Minister of Justice. The Act also provides a Registrar of Affected Organisations, with wide ranging powers, to be appointed by the State President. The powers of the Registrar include the power to bring an application in the Supreme Court for the confiscation of the monies of an affected organisation. The Act further provides for the appointment of an Authorised Officer. This officer is granted extensive powers in relation to the searching of premises and the seizure of documents and other information of an affected organisation. The Working Group is of the opinion that the extensive discretionary powers conferred on the State President, the Minister of Justice and the appointed officials in terms of this Act accords the State an unwarranted amount of control over political organisations. Taking into account that the Government is but one to the parties to take part in the upcoming general election, the possibility of such control resting in the hands of the Government casts doubt over the possibility of free political activity on an equal footing. The Working Group acknowledges that the issue of foreign funding of political parties taking part in an election is sensitive but feels t hat
if this issue is to be regulated at all, it should be dealt with by the Transitional Execut ive
Council or the Independent Electoral Commission. The Working Group consequently recommends that the Act be repealed in full.

Publications Act of 1974

This Act has not been used to impede free political activity lately. It is recommended that the Act as a whole should be revised and repealed or amended in accordance with a Bill of Fundamental Rights. As far as the immediate future is concerned, the clauses dealing with State Security, good order, etc, should be repealed. Clauses dealing with racial "hate speech" could arguably be retained, in the short term.

Parliamentary Internal Security Commission Act 7 of 1976

This Act makes provision for a Parliamentary Internal Security Commission, with the function of investigating matters which, in the opinion of the State President, affect Internal Security, and of reporting thereon to the President. Furthermore the Commission is also empowered to investigate legislation and contemplated legislation and to report thereon to the State President. The President, in consultation with the leader of the opposition, is entitled to refrain from making the contents of these reports public. Furthermore, the Commission is accorded powers similar to those of a Provincial Division of the Supreme Court in relation to the summonsing of witnesses

(5)

and the disclosure of documents, books and other objects. Failure to comply with a request to appear before the Commission or to furnish the Commission with information is declared a statutory offence, with specified punishment attached thereto. It is submitted that these wide ranging powers constitute an infringement by the executive on the functions of the legislature and furthermore confers judicial powers on the legislature and executive which are not in their province. More importantly, the powers of the Commission pertaining to the disclosure of information, coupled with the element of secrecy and lack of accountability constitute a definite threat to the free political proce ss.
The Task Group recommends that the Act be repealed in full.

Internal Security Act 74 of 1982

The Working Group recognises the need for security legislation, but nevertheless that the following provisions of the Act place unnecessary and unjustified restrictions on free political activity.

* Section 50

This section furnishes a police officer with the competence to arrest and detain a person without a warrant if, in the subjective opinion of that police officer, the actions of that person are likely to result in certain specified effect, and if, again in his subjective opinion, the detention of that person will have certain specified desired results. The Working Group is aware of the continuing unrest and occurrences of public violence in our country and recognises the consequent necessity for police officers to be able to take quick decisions and act promptly under difficult circumstances. Nevertheless, it is submitted that a decision of this nature and magnitude, a decision to deprive a person of his/her personal freedom without adhering to the usual procedural requirements, should not be left to the subjective judgement of an individual police officer. The Working Group proposes that such a decision should rather be subjected to an objective test, so that the element of arbitrariness inherent in any subjective decision can be avoided. Consequently the Working Group recommends that the provision be amended so as to subject the merits of the decision by an officer to an objective test. This would enable the courts to test the substantive validity of such a decision and would contribute to the equal treatment of all citizens in this regard. Ultimately it would also contribute towards the attainment of the ideal of an atmosphere of free political activity.

Â» Sections 58, 59 and 60

These three sections place and additional sanction on unlawful behaviour where the unlawful behaviour is specifically aimed at protesting against laws of the country. It would thus seem that the provisions have as their aim a prohibition on civil disobedience, that is on the wilful contravention of the law with the express aim of protesting against the

law. The Working Group regards civil disobedience within certain constraints as a legitimate part of the free political process and therefore regards any such prohibition as inhibiting that process. The Working Group therefore recommends that the provisions be repealed.

Section 62

This section contains a prohibition on the causing, fomenting or encouragement of feelings of hostility between different population groups. The Working Group recognises the pressing need for reconciliation between the different population groups in the country but maintains that the provision is too vague and wide and does not leave room for the degree of freedom of speech required to conduct free and fair elections. Consequently, the Working Group believes that this provision can potentially inhibit free political activity and recommends that it be repealed or amended.

Disclosure of Foreign Funding Act 26 of 1989

This Act makes provision for the appointment by the Minister of Justice of a Registrar of Reporting Organisations. This official is accorded the discretionary power to declare an organisation a reporting organisation, whereupon such an organisation is required to disclose specified information pertaining to foreign funding received by it. The Registrar is also accorded certain powers in relation to the searching of premises and the

seizure of documents of the reporting organisation. The Working Group is of the opinion that this Act has the potential of inhibiting free political activity. The Act plac es
undue power in the hands of the State and places an unnecessary burden on political organisations regarding their receipt of funding. The Working Group recognises that the issue of foreign funding of political parties is potentially sensitive, but is of the opinion that any possible regulation of such funding be left to the Transitional Executive Council or the Independent Electoral Commission. The Working Group consequently recommends that the Act be repealed in full.

NEGOTIATING COUNCIL

# TENTH REPORT OF THE TECHNICAL COMMITTEE

# ON CONSTITUTIONAL ISSUES

# TO THE NEGOTIATING COUNCIL

20TH AUGUST 1993

Following upon the debate in the Negotiating Council on our Eighth Report we evaluated each part of the text which came under discussion and where necessary

took such steps as we thought were appropriate. Such steps include:

1.1 additions and omissions to the text and each of these are indicated appropriately on the face of the text,

1.2 reformulation of certain provisions to achieve clarity, eradicate inconsistencies or to bring the text in line with consensus which may

have emerged during the course of the debate in the Council.

We suggest that the debate be concentrated on these changes. Consequently,

we have attached hereto detailed and refined texts of Chapters 1, 2, 4, 5and 9. The final edit has not been completed, however, the texts are in a form which, if found in order, may be approved by the Council. We have refrained from dealing with matters in which a participant has suggested changes of substance on which no decisions

were taken by the Negotiating Council.

We have added to the existing text a preamble and schedules 5 and 6. The Negotiating Council has already referred the settling of a preamble to the Planning Committee. Consequently we have produced a preamble which may serve as a basis for further discussion. Schedule 5 describes a possible system for the election of a National Assembly and SPR Legislatures. Schedule 6 contains proposed formulations for oaths and affirmations for the President, Ministers and members of Parliament and SPR legislature. We draw the attention of the Council

to the fact that there is no reference to any Deity in the body of the Oath.

As we intimated in paragraph 2 of our Eighth Report, preliminary texts for Chapter 6 (the Executive Power), Chapter 7 (the Judicial Power), Chapter 8 (the Ombudsman and Human Rights Commission), and Chapter 10 (Local

Government) have been developed. In certain instances more than one text per

chapter has been developed by us. None of these preliminary texts have been attached to this report. This is so, firstly because the development of these sections has taken considerably more time than was originally anticipated.

Secondly, the refinement and reworking of the text on Chapters 1, 2, 4, 5 and 9, on the basis of the discussions in the Council used up a substantial portion of the

time at our disposal.

4. We have, however, in our Eleventh Report, produced a provisional outline of a text on the Executive Power, as well as a report which, again, identifies policy issues that call for determination by the Negotiating Council and instructions to our Technical Committee.

5. During the debate on our Eighth and Ninth Reports in the Negotiating Council certain matters which need greater clarification have remained undetermined or unresolved. Some of these matters have been referred to the Planning Committee with a view to facilitating agreement between the parties. None of the following matters can be finalised by us until we receive clear instructions from the

Negotiating Council:

5.1. Definition of the National Territory (section 1(2);

5.2. National symbols inclusive of National Flag, Anthem, Coat-of-Arms, and

Seal, (section 2);

5.3 Languages, (section 3);,

5.4 The deadlock breaking mechanisms set out in Chapter 5;
S5 SPR Constitutions;
5.6 Whether the Constitutional Assembly will have the power to alter the

number, boundaries and powers of SPRs described in the
Constitution for the transitional period, and
o All matters relating to areas of competence of SPR Governments set out in

section 118.

In the detailed drafts of Chapters 1, 2, 4, 5 and 9 it is contemplated that certain legislation will have to be enacted before the coming into operation of the Constitution for the transitional period. Such enactment should be done sooner rather than later and in any event not after the coming into operation of this

Constitution. Such legislation will include the following:

6.1. Electoral Act 1993 (section 6)

6.2. Rationalisation of existing citizenship laws (section 5)

6.3. Statutory provision in respect of the preparatory work on the continuation, transfer and consolidation of existing administrative responsibilities

(section 102 rtw Sec 119).

We suggest that the instructions for the drafting of the legislation envisaged in 6.2 and

6.3 be given as soon as possible.

7. During the debate of this report before the Council we shall make an oral presentation of the refined texts placed before you. In doing so, we shall refer to all changes made to the text and direct the Council's attention to those issues which call for decisions on principle. However, for the convenience of the members of the

Council we draw attention to the following matters :

7.1 Sec. 4: Supremacy of the Constitution

During the debate in the Negotiating Council the question was raised whether the draft Independent Electoral Commission Act is compatible with the Constitution. Section 4 (1) of the Constitution provides that the Constitution shall be the supreme law of the land. According to section 3.1 of the draft Act, the draft Act shall be binding on the State. Where a conflict may arise between the provisions of the draft Act and the inherent powers of the state or the

provisions of any other statute, save for other transitional legislation,

the draft Act shall override such powers and provisions insofar as

they relate to the conduct and supervision of elections, referenda and other matters dealt with in terms of the draft Act. ' Transitional legislation' is defined by the draft Act to include inter alia the 1993 Constitution. As the 1993 Constitution enjoys supremacy, which supremacy is reflected by the draft Act, no conflict arises between the two.

The provisions of the draft Act purport to apply in respect of the first and

subsequent elections for Parliament and SPR legislatures.

1.2 Sec. 5(3): Citizenship
Section 20 prohibits the deprivation of South African citizenship. It is common that states provide by law for the loss of citizenship, if the citizenship of another country is acquired voluntarily (inter alia, to avoid multiple citizenship). We have therefore retained section 5(3)

and we suggest that the Council reconsider section 20.

e Chapter 3: Fundamental Rights

One participant sought the inclusion of rights of national, ethnic, religious and linguistic minorities under the Chapter on Fundamental Rights. Our response then, and now, still is that a debate in this regard

relates to the brief of the Technical Committee on Fundamental

Rights. International law recognition of the rights of national, ethnic,

religious and linguistic minorities could properly be dealt with under Chapter 12 when provisions on the status of international law is

debated.

Sec. 38(2): Legislative Authority

This provision has been deleted. Parliament, in any case, is competent to

delegate by law any matter within its competence.

Section 40(2) and 43(3) and 103(a): ’"Ordinarily Resident"

The question was raised whether "ordinarily resident", as opposed to "domicile", is an appropriate criterion to serve as a "link" between a candidate and a particular SPR. Whether a person resides at a particular place at any given time depends upon all the relevant

circumstances, in particular:

A distinction should be drawn between domicile and residence
A person can have more than one residence at the same time;
A person cannot be said to reside at a place where he or she is temporarily

visiting.

Ordinarily resident is somewhat narrower than "resident". A person is "ordinarily

resident" where he or she has his or her usual or principal residence, ie. what may be

described as the person's real home, although the person may be temporarily or occasionally absent. The question whether a person is ordinarily resident at a place is one of fact. For this reason, depending on the facts, it is possible that a hostel dweller coul d be

ordinarily resident in a hostel.

One's domicile is one's "address prescribed by law" and for certain mainly private law purposes, depending also on ones subjective intention. In some cases, the common law ascribes a domicile regardless of a person's physical presence (such as a minor following his guardian's domicile, a wife her husband's.) Proof of domicile is often complicated. For the purposes of this Constitution for the transitional period the term ordinarily resident, therefore, seems to be the appropriate identification criterion for nomination as a

candidate.

7.6 Sec.43(1)(b): Anti-Defection Clause

During the debate before Council one participant suggested that the "anti-

defection clause" herein contained may have to be elaborated upon in

line with the provisions to be found in the Constitution for India. We have studied the Indian Constitution and annex hereto the Tenth Schedule thereof containing anti-defection provisions. Another participant has made submissions to us to the effect that the "anti-defection" provision of section 43 (1) (b) should be deleted. The Negotiating Council is requested to signify whether the provisions of section 43 (1) (b) should be retained and if so whether any provisions

similar to those in the Indian Constitution should be incorporated.

7.7 Sec.43(2): Filling Vacancies in the National Assembly

We have amended this provision in order to gain greater clarity. During the debate before Council the filling of vacated National Assembly seats

in order of preference of the parties' election lists compiled for the

previous general election, was questioned. Some of the parties in the Council sought greater flexibility and thus the right not to observe the order of preference as the parties' election lists, after elections.

Research in this area has, thus far, yielded no example of a constitutional dispensation using a party list system in which the order of preference of party election lists is not observed for purposes of filling a vacancy in the electorate body. The only other

method for the filling of such vacancies, which is used in a few

exceptional cases, is the holding of by-elections.

7.8 Sec.47(2): Composition of the Senate

This provision has been amended by deleting the reference to a single

transferable vote. The Electoral Act, 1993 shall have to set out a rather detailed and complex voting system based on a single transferable vote or such other system of proportional representation as the Council may decide upon. We suggest that this issue be

referred to the relevant Technical Committee.

1.9 Sec.58(3): Ordinary Legislation

During the debate a question was raised regarding the procedure for the adoption for ordinary legislation where it is passed by one House and rejected by the other. Under the present section 58(3) such legislation will be referred to a joint committee consisting of members of all parties represented in Parliament to report on proposed amendments, whereafter the bill shall be referred to a joint sitting of

both Houses which may adopt the bill by a majority of the total number of

members. We were requested to investigate other possible ways to resolve such a deadlock.

Different methods to promote consensus between the two houses can be identified:

Adoption by a joint sitting of both Houses by a special majority of the members of both Houses.

If the two Houses cannot agree after a minimum period of eg 3 months, Parliament may be dissolved to hold an election.

A process where bills are considered and amended by each House and then be submitted to the other until agreement is reached (la navette).

Reference of the bill to an arbitration committee consisting of an equal number of members from both Houses.

7.10 Sec.101(1) and (2): SPR Legislatures

During the debate we were requested to spell out the power of the SPR to

make laws. That we do in subsection (1). This subsection may have

to be reconsidered in the light of decisions taken in regard to SPR constitutions. We have also added subsection (2) to make it clear that SPR laws will normally be applicable only within their own territories.

7.11 Sec 118 (4) (5) (6) and (7): Concurrent Powers of SPRs and

Parliament

We have been urged by one participant to introduce "objective criteria" as a justiciable basis for determining the relative powers of SPR Governments and the National Government in the field of concurrent legislative competence. We were referred to the provisions of section 72 of the German Constitution which provides:

"(Concurrent Legislation of the Federation, definition)

(1) In matters within concurrent legislative powers the Laender shall have power to legislate as long as, and to the extent that, the Federation does not exercise its right to legislate.

(2) The Federation shall have the right to legislate in these matters to the

extent that a need for regulation by Federal legislation exists because:

1. a matter cannot be effectively regulated by the legislation of individual Laender ,or

2. the regulation of a matter by a Land law might prejudice the interests of other Laender or of the people as a whole, or

3. the maintenance of legal or economic unity, especially the maintenance of uniformity of living conditions beyond the territory of any one Land,

necessitates such regulation."

The provisions of section 118 relating to the legislative competence of the SPR have been referred to the Planning Committee for further deliberation. As soon as clear directives are given to us in that regard we shall be in a position to re-draft

the provisions of section 118, if so required.

112 Subsection 113(6): Remuneration of SPR Executives

The question was raised whether the remuneration of SPR executives should be subject to limits and restrictions by the national government. The

provision as formulated reflects SPR autonomy.

Circumstances such as the financial ability of and workload in an SPR may

differ between SPRs. Unreasonable expenditure should be accounted for at the polls.

We have however made editorial changes without altering the substance.

7.13 Subsection 113(7): Appointment of SPR Secretary and other

Officers
This section gives the Commission only a consultative or advisory role. The SPR executive will still be entitled to appoint the officers independently and autonomously. The Commission will only assist

the SPRs in the process of rationalisation of administrations.

7.14 Subsection 118(3)(a)(c) and (d): Areas of competence of SPR

Government
We have reformulated these two subsections in the light of the debate in the Council. This however may still be subject to further change depending on recommendations made by the Planning Committee

relating to section 118.

115 Sec.119: Transfer of Administrative Responsibilities

When section 119 came up for discussion, the comments by participants in

the Council were wide ranging and included matters such as the

wording of the section, the absence of time-frames, an assertion that

the formulation contains inconsistent logic and finally that the service

of people skilled in public administration should be engaged to assist in the drafting of the relevant provisions.

At then end of the debate before the Council, it was decided that the Technical Committee re-visit the provisions of section 119 and work out a graphic representation or a flow-chart of the transitional processes envisaged in section 119. Graphic representations of the transitional processes regarding administrative structures envisaged in

section 119, are attached.

We have studied the Eighth Draft Bill on the Transitional Executive Council with a view to provide for preparatory work in respect of the rationalisation, consolidation of administrative institutions and structures which would be in existence in various SPR's at the date of coming into operation of the Constitution for the transitional period.

The only sub-council of the TEC which may have some relevance to the

processes envisaged in section 119 is the one on regional and local

government.

The powers and functions of the sub-council on regional and local

government bear some resemblance to provisions of paragraph 8.2.

of our 8th report in which we propose that certain preparatory work and planning be undertaken by the TEC in the period between the enactment of the Constitution for the transitional period and its coming into force. = We there proposed the appointment of a

Secretariat for each SPR.

We now suggest further that consideration be given to the establishment of an independent and non-partisan statutory body consisting of nominees of the Multi Party Negotiating Process whose specific function shall be to undertake all such functions and duties as would constitute preparatory work that would facilitate the continuation, transfer, consolidation and rationalisation of existing administrative and financial responsibilities envisaged in section 119. Members of the statutory body would have to be available on a full-time basis. This body should continue to function at least until the Commission on SPR government contemplated in section 121 of the Constitution has been established. The body could also perform the function

envisaged in section 102 (1).

We have reformulated section 119 in order to enhance its clarity. The

7.16

reconstruction of existing administrations also has financial implications. The SPRs will start life with obligations but no financial resources. The Chapters of the Constitution dealing with finance and transitional provisions will have to make provision for the manner in which assets and liabilities of the TBVC states and the selfgoverning territories and the Provinces will be dealt with, and how the initial funding of SPRs will be provided. They will also have to deal with what will happen to the various revenue funds of the governments and administrations which will cease to exist when the Constitution for the transitional period comes into force. This is not a matter that we can address without instructions. We suggest that the Planning Committee set up a special technical group with the necessary expertise to make recommendations to the negotiating council in regard to how these issues be addressed, and how revenue previously accruing to such governments and administrations shall be allocated in the period immediately following the coming into force of the Constitution. Also how such revenue will be handled and accounted for, including how assets and liabilities of former

government and administrations shall be dealt with.

Sec. 121(5): SPR Loans and Taxes

Having listened to the debate on these subsections we decided not to effect any changes thereto. It was suggested that the advice or approval of the Reserve Bank be sought as well. However, it is not necessary to make that addition since, in any event, an SPR government would not be competent to raise a foreign loan without the approval of the national

government.

7.17 Sec 121 (6) and Sec 118 (4): SPR Competences

It has been contended that section 121(6) read together with section

118(4)(a) undermines SPR's concurrent legislative competence in

respect of taxation for SPR purposes insofar as 121(6) subjects the

competence of the SPR Government to levy taxes to the approval of

the National Assembly. We have not debated nor canvassed this

matter any further as all matters relating to the competencies set out

in section 118 have been referred to the Planning Committee for

further deliberation.

7.18 Sec. 124(4): _SPR Constitutions

During the course of the debate certain inconsistencies in the usage of the word "adopt" or "adopted" were raised. We are of the view that the provisions in section 124 can be improved substantially by re-drafting. However, these provisions are tied up with the entire debate around dead-lock breaking mechanisms and SPR

Constitutions. As

soon as we have received a clear directive from the Planning Committee or Council we shall be in a position to re-draft this clause and also

refine the wording thereof.

7.19 Sec. 126: Election of new SPR Governments

The question was raised as to why elections to be held in SPRs, whether in an existing SPR or newly reconstructed SPR, should have the

approval of the Constitutional Assembly are twofold. There may be

practical considerations for this. On the one hand, the possible recomposition of the Senate and time-schedules for the approval of the new constitutional text, and elections to be held hereunder, may urge the Constitutional Assembly to regulate and co-ordinate the times of elections for SPR legislatures and their Executives; on the other hand, deadlocks in the Constitutional Assembly which might lead to a referendum or national elections could necessitate the postponement of SPR elections or at least require some measure of co-ordination. In short, the provisions of section 126 were intended as practical measures to harmonize the process of national

constitution-making and the implementation of SPR constitutional

dispensations.

7.20 Sec. 129: The Commission on SPR Government

The function of the Commission is to advise and make recommendations to the National and SPR governments; in this respect, it is foreseen that the Commission's work will be technical and supportive. However, in order not to make the Commission a faceless bureaucratic institution divorced from political and constitutional realities thus

neglecting the wishes of SPRs, its composition should be such that at

least one member should be appointed from each SPR with the approval of the Premier of the SPR. In the main, the Commission will ensure that the establishment of SPR governments and the elaboration of SPR constitutions will be co-ordinated and administrative structuring of governments on SPR levels rationalised. In the latter respect, it can be foreseen that the Commission will play an important role in ensuring that available human resources are employed maximally, eg by recommending and advising SPR governments on the structuring of their administration. Furthermore, the Commission will serve as an advisory and co-ordinating body in the drawing up of SPR constitutional dispensations. In this regard, the work of the Commission will be technical and supportive, which explains why members of the Commission must perform their duties fairly, impartially and independently. Since it is foreseen that the Commission will be a body of professionals, it is provided that it may establish work committees and co-opt persons to serve on or advise such committees. It is not foreseen, however, that the Commission will become a large bureaucratic institution. It should in terms of the Constitution be a highly specialised body, politically accountable to the National as well as SPR governments which

performs its functions and duties openly and publicly. For this

reason it may be a good idea to add a provision which obliges the Commission to have its reports tabled in the Constitutional Assembly.

7.21 Sec. 134(1): Co-options by Commission

A question raised during the debate was whether the approval of the President should be required for the co-option of a member to a committee of the SPR Commission. We do not consider this to be necessary. The co-opted member has no vote and is co-opted only to

a committee and not the Commission itself.

7-22 Schedule 5

This is a proposal specifically designed to cater for a single ballot. To our knowledge there is no international precedent for this procedure, and the Negotiating Council should consider its implications, and whether

or not separate ballot papers should be used for the elections of the

National Assembly and the SPR legislatures.

FIRST REPORT:13 MAY 1993

SECOND REPORT:19 MAY 1993

THIRD REPORT: 27 MAY 1993

TECCOM/CONSTITUTIONAL ISSUES

10TH REPORT/20 AUGUST 1993

FOURTH REPORT:3 JUNE 1993

FIFTH REPORT:15 JUNE 1993

FIRST SUPPLEMENTARY REPORT ON
CONSTITUTIONAL PRINCIPLES
15 JUNE 1993

SECOND SUPPLEMENTARY REPORT
ON CONSTITUTIONAL PRINCIPLES
23 JUNE 1993

SPECIAL REPORT ON CONFEDERALISM
22 JUNE 1993

THIRD SUPPLEMENTARY REPORT
ON CONSTITUTIONAL PRINCIPLES

SECOND SPECIAL REPORT ON
CONFEDERALISM
26 JULY 1993

FOURTH SUPPLEMENTARY REPORT ON
CONSTITUTIONAL PRINCIPLES
26 JULY 1993

DRAFT OUTLINE OF THE
CONSTITUTION 26 JULY 1993

EIGHTH REPORT:26 JULY 1993
NINTH REPORT:10 AUGUST 1993

DRAFT OUTLINE OF THE
CONSTITUTION:6 AUGUST 1993

TENTH REPORT:20 AUGUST 1993

TECCOM/CONSTITUTIONAL ISSUES

10TH REPORT/20 AUGUST 1993

19. ELEVENTH REPORT:20 AUGUST

20. DRAFT OUTLINE OF THE CONSTITUTION:20 AUGUST 1993

TECCOM/CONSTITUTIONAL ISSUES

10TH REPORT/20 AUGUST 1993

COMBINED REPORTS

OF THE

TECHNICAL COMMITTEE ON

CONSTITUTIONAL ISSUES

10TH REPORT/20 AUGUST 1993

MAY – AUGUST 1993

EXECUTIVE SUMMARY OF THE TECHNICAL COMMITTEE ON THE
AMENDMENT OR REPEAL OF LEGISLATION IMPEDING FREE POLITICAL
ACTIVITY AND DISCRIMINATORY LEGISLATION

Planning Committee Minutes (5.1.5) of Monday 17 May recommended that the Technical Committee follow the first option mentioned in their first report (i.e. Paragraph 1.1 of report dated 13 May) - i.e. "To study all the laws and subordinate legislation pertaining to all forms of political activity normally associated with democratic elections."

1.1 The Technical Committee would "be assisted in this regard by the seconded members from the relevant justice departments, i.e. from the South African and TBVC States Department of Justice" (5.1.5 P.C. minutes of 17 May)

Negotiating Council meeting of 18 May (Item 5.7)
2.1 The Committee was requested to:
2.1.1 Take into account concerns of delegates, including Traditional Leaders.
Within a period of two weeks:
2.2.2.11dentify those laws which are discriminatory and inhibit free political activity for reporting back to the Negotiating Council
2.2.2.2Propose a "higher code" and implementation mechanisms
(see First Report (13 May Item 1.2, 4, 5)
Technical Committee Final Report of 1 June
Discussed at Negotiating Council Meeting of Tuesday 22 June (Item 4.6)
3.1 Report tabled and presented. Discussion postponed.
3.2 Committee mandated to have discussions with other Committees on overlapping

issues.

Discussion on report in absence of members of the Committee took place at the Negotiating Council Meeting of 28 June 1993.

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Aspects of the Report Agreed Upon in the Negotiating Council:

4.1.1 A tribunal would be formed to deal with judicial issues relating to the election. This would be referred back to the Technical Sub-committee in conjunction with the IEC for more detail on the functioning thereof.

Issues referred back for debate:

4.2.1 Matters to be referred to the Independent Electoral Commission Technical Sub-committee:

4.2.1.1 A Code of Conduct for an election (point 5.4.1.)
4.2.1.2The freedom to form political parties, to belong to them and to stand as candidates (point 5.4.2.)

Matters to be dealt with when the MPNP dealt with the TEC:

4.3.1 Any issue impacting on the levelling of the playing field

Issues clarified/requiring clarification by the Negotiations Council:

4.4.1 Referring to Clause 5.10.3.2.1., regarding the assumption that there would be a voters roll: it was noted that this assumption could not necessarily be made. Voting could be done by way of registration or by a decision that everybody who has an ID document would be entitled to vote.

4.4.2 In clause 5.10.12.1., reference is made to 10 regions. Clarity was needed on whether this referred to the establishment of regions and if it was bound up with the number of regions.

EXECUTIVE SUMMARY OF THE TECHNICAL COMMITTEE ON THE

INDEPENDENT MEDIA COMMISSION

The Negotiating Council has discussed the provisions of the 7th draft of the IMC Bill. The following issues/sections were referred back to the Technical Sub-committee for clarification and redrafting:

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The question of whether the IMC should regulate the privately owned print media;

Appointment of members of the Commission (Section 4 (2))
Extra legal experience (Section 5 (2))

Disqualification relating to crimes of dishonesty (Section 6 (h))
Regulations (Section 25)

Offenses and Penalties (Section 26)

Delegation of powers (Section 27)

This has been addressed in the sixth report of the Technical Sub-committee on the Independent Media Commission and Independent Telecommunications Authority (1 July 1993) (Eighth Draft of the Independent Media Commission Bill)

TECHNICAL COMMITTEE ON THE TRANSITIONAL EXECUTIVE COUNCIL

Number of reports tabled: 6
First report discussed in the Negotiation Council: 18 May 1993

(refer to list of submissions – see Index)

Discussion of further reports by the Negotiating Council has been postponed since the first discussion: refer to the extracts from the minutes attached.

Issues relating to other Technical Committees:

1. The Technical Committee on Violence has referred the issue of the future of armed formations to the TEC

2: Both the TEC and the IEC Technical Committees need to consider the issue of electoral jurisdiction during the transitional period.

3 The TEC is considering the adjudicatory function of the IEC (Section 5 of the first report), and notes that a final recommendation in this respect will only be possible after consideration of the report and recommendations of the IEC Technical Committee

# EXECUTIVE SUMMARY OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES

The Third Supplementary Report on Constitutional Principles of the Technical Committee on Constitutional Issues to the Negotiating Council (30 June 1993) has been accepted by the Negotiating Council with the following amendments/exceptions:

1.1 Principles 2.18, 2.24, 2.24.1 and 2.24.9 were referred back to the Technical Committee.

1.2 Principles 2.1, 2.12, 2.16, 2.24.11, 2.24.12, as well as the third proposed addition, were amended and accepted.

In the (30 June 1993) the Negotiating Council requests the Technical Committee on Constitutional Issues to draft a Constitution for the Transition Period.

Paragraphs 4 and 5 of the Fifth Report of the Technical Committee on Constitutional Issues provide both the Technical Committee with a framework for drafting the Constitution and interested parties with a framework for compiling submissions to the Committee (for which the deadline is 12 July 1993).

The Fourth Report on the powers and functions of SPRs during the transition was discussed and taken note of.

The Fifth Report of the Technical Committee:

5.1 It was agreed that the Technical Committee be mandated proceed with their work as referred to in paragraph 4 and 5 of their Fifth Report. This would include the drafting of a constitution along the basic framework as suggested in paragraph 4 of the said report.

5.2 The drafting of this constitution should be interpreted in the light of the resolution as adopted by the Negotiating Council on 30 June 1993. (Resolution on Steps to be Taken for the Purpose of Establishing a New Constitutional Order)

# THE FOURTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL 3 JUNE 1993.

i

## Introduction

1.

The process of transition contemplated by the Resolution submitted by the Planning Committee to the Negotiating Council on 1 June 1993 requires

agreement to be reached by the Multi-Party Negotiating Forum on:

1.1.1 General Constitutional Principles
1.1.2 A constitutional principle on the allocation of powers to different levels of government

1.1.3 A constitutional framework which makes provision:

1.1.3.1For the election of a Constitution Making Body which will adopt a constitution;

1.1.3.2For government at national, regional and local levels during the period between the election for a constitution making body, and the adoption of a new constitution by that body - the transitional period,;

1.1.3.3For the establishment of structures for national, regional and local government, the powers that each level of government will have, the way each will function and take decisions during the transitional period, and the manner in which the different levels of government will

relate to one another.

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The Resolution requires us to make recommendations to the Negotiating Council

on:

1.2.1 The powers, functions and structures of the SPR during the transitional period;

1.2.2 The constitution making prbcess to be followed, including the structures that need to be established for that purpose;

1.2.3 The procedures to be followed in the drafting and adoption by the Multi-Party Negotiating Forum of a constitution for the transitional period;

1.2.4 The procedure to be followed thereafter in the drafting and adoption of a

constitution by an elected constitution making body.

The issues which we have to address are once again inter-related and the tension which we have previously identified between decisions to be taken by the MPNP, and decisions to be taken by the Constitution Making Body is likely to

arise at each stage of the process.

In this report we will address the powers, functions and structures of the SPR during the transitional period. We will do this in the context of our previous reports and in the knowledge that decisions taken in relation to the SPR during this period, have a bearing on the constitution making process as a whole, and

on the functioning of the elected Constitution Making Body.

The need to make provision for a legal framework to regulate SPR government between the adoption of a constitutional framework by the MPNP, and the adoption of a new constitution by the elected Constitution Making

Body cannot be questioned. The nature of that framework depends, however, to some extent upon the way in which the transitional framework is conceptualised.

We deal with this later in our report.

Assumptions regarding the constitution-making process and the establishment of regional government

To enable us to formulate concise suggestions regarding the powers, functions and structures of SPR's during the transitional period, we have to make certain assumptions relating to the constitution making process:

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Due to the variety of structures at present in existence (in particular the Provincial Governments, the TBVC states and the Self-governing Territories), various scenarios are possible depending upon the continuation or not of those, or some of those structures when a transitional constitution comes into effect.

For the purposes of this Report we therefore assume that:

(@) Transkei, Bophuthatswana, Venda and Ciskei will have been reincorporated into South Africa at the time of the coming into operation of the transitional constitution;

(b) The operation of the constitutional legislation underlying the institutions of the Self-governing Territories (Act 21 of 1971) and related measures will have ceased at the time of the coming into operation of the transitional constitution.

The variety of existing regional and second-tier administrations will not be capable of instant rationalisation, whatever geographical or structural form the transitional regional dispensation may take. Personnel and infrastructures of each of the existing administrations will have to be taken into consideration in the process of inevitable rationalisation.

We therefore assume that the transitional constitution will make provision for the consolidation of the political authority over all the existing administrations and the infrastructure within each SPR established for the period of transition, and that the greatest measure of continuity of

employment and services will be ensured during the process of

rationalisation.

The different approaches to SPR's in the transitional period

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Broadly, two models of interim SPR's have been proposed:

3.1.1 The first envisages the establishment of interim regional administrations

within existing provincial boundaries for the purpose of phasing out apartheid based structures, rationalising existing administrations and

ensuring the provision of services in the transitional period.

3.1.2 The second contemplates the establishment of fully fledged transitional

regional governments within boundaries demarcated for the purposes of

the elections, and with elected legislative and executive structures.

These models have implications for the divisions of powers between national government and SPR's in the transitional period, the structures and composition

of those SPR's and the effective powers of an elected CMB.

The two models overlap to the extent that they both envisage the reconstruction and rationalisation of existing second tier structures of government, an agreed distribution of the function of government between the national and regional levels in the transitional period, and the adoption of a final constitution by an

elected Constitution Making Body.

No matter how the transition is conceptualised, three matters are clear:

* First, that the framework will have to make provision for effective

regional administration during the transitional period.

* Secondly, that this will have to be done in way which has regard to the regional authorities (including the TBVC states), which may be in

existence when the new arrangements are implemented.

* And finally, that this must all be done in way which is compatible with

the powers and functions of the elected Constitution Making Body.

4. The allocation of powers to SPR's during the transition

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The process of the allocation of powers and functions between different levels of government is always a complex task. It is particularly difficult to undertake this task for a transitional period, when the nature of the final constitutional order has

not been settled.

It would be more appropriate in these circumstances to have a flexible allocation of powers, which at SPR level could be exercised subject to the supervision of the Constitution Making Body and a broad based government of national unity. If this were to be done, the distinction in the emphasis in the two models to which we have referred between administration on the one hand and government

on the other could be bridged.

As long as the demarcated boundaries are broadly acceptable, a way forward

could be the acceptance of a model in which:

4.3.1 Provisional regions are established in accordance with the demarcated boundaries;

4.3.2 Provisional regional authorities are established on the basis of the electoral results within such regions;

4.3.3 Powers consistent with criteria such as those contained in our Third Report are vested in the Provisional Regional Authority;

4.3.4 Such powers are stated in general terms and are made subject to the supervision of the Constitution Making Body.

4.4.4 This would enable the foundations for SPR governments to be

established and the necessary rationalisation to be undertaken, without finalising the precise boundaries of the SPR's and the precise areas of competence of the different levels of government. Those tasks would be left to the Constitution Making Body to accomplish within the framework of the constitutional principles and the detailed principle

dealing with the allocation of powers to different levels of government.

Suggested allocation of powers and functions of SPR's during the transition

With reference to the criteria to be applied in the allocation of powers between

national and SPR governments set out in paragraph in 3.9 of our Third Report,

it is our view that during the transition SPR Governments could be entrusted

with powers pertaining to the following functional areas, within the framework

described in paragraph 4:

5.1 The imposition of SPR taxes
5.2 Appropriation of revenue

5.3 Health services

5.4 Welfare

5.5 Education

5.6 The environment

5.7 Local government

5.8 Town planning

5.9 Tourism and recreation

5.10 Agriculture

5.11 Public media

5.12 Public works and roads

5.13 Traffic control

5.14 Local policing and law enforcement
5.15 Casinos, racing and gambling
5.16 Transport

5.17 Cultural affairs

5.18 Traditional authorities
5.19 Protection services
5.20 Markets and pounds

5.21 Fish and game preservation
The allocation of specific elements of these functional areas to SPR's and other levels of government requires expertise in the field of public administration. Such detailed allocation should be done at the time of the drafting of the transitional constitution.

6. Structures of the SPR's during the transitional period
The exact structures of the SPR's are matters to be negotiated and agreed upon. However, these structures, including the form of regional government, should be democratic and in accordance with the Constitutional Principles as developed in our previous Reports.

i Outstanding matters

We will deal with the other matters set out in paragraph 1.2 in subsequent reports.

# THE SEVENTH REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL 29 JUNE 1993

## 1. Introduction

At the end of the meeting of the Negotiating Council on Thursday 24 June 1993, the chairman summarised the debate by indicating that we are required to -

1.1 Synthesize proposals on the table into a systematic form and present a model/scenario in respect of the "bottom up" approach.

1.2 ...explore further the "equilibrium" offered in paragraph 4 of (our) Sixth Report creating common ground and bridging the differences among participants.

1.3 Look into the establishing of SPR Governments and Legislatures at the time of the national election (and) how these will be linked with the national structures.

From this it would appear that we are required essentially to develop two scenarios, one describing a constitution making process in which preference is given to the drafting of SPR constitutions, the other describing a possible via media that may meet the preferences of the different schools of thought represented in the MPNP.

We deal with the first scenario in paragraph 4 below, and with the second in paragraph 6.

Avoiding terminological traps

In the political debates in the Negotiating Council, in some of our instructions, and consequently in some of our Reports, terminology is employed that in our view is not

legally accurate and does not promote clarity of the issues.

Firstly, as we have indicated in our Sixth Report, it is less than accurate to refer to a "bottom-up" as opposed to a "top-down" process: both schools of thought contain

elements of national and sub-national negotiations, decision making and implementation.

Secondly, it appears that a distinction between a one- and two-phased process produces more confusion than clarity: the "bottom-up" approach has been associated with a one phased constitution making process, but, as appears from paragraph 4 below, that scenario also requires more than one phase, although it does not call for a constitution

for a transitional period.

Analyses and suggestions regarding process and submissions reviewed in previous

reports

3.1 In our Sixth Report we describe the principal features of the "bottom up" constitution making process and draw attention to the fact that the proposals that

support this process differ as to detail. In this rÃ©port we address the main

differences and make suggestions as to how they could be brought together so as

to constitute a single scenario.

There is broad agreement amongst those who favour this process that federalism should be agreed upon as a constitutional principle, and that the federal states should be established on the basis of residuality and asymmetry. We give a brief description of residuality in paragraph 4.3 of the schedule to our Sixth Report, and of asymmetry in paragraph 4 of our Third Report.

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There is also broad agreement that constitutional principles should be developed as a framework for the formulation of SPR powers and functions, and that the boundaries of the SPRs that will constitute the federal units will have to be agreed upon by the MPNP.

The IFP proposes that a commission be appointed to assist "political formations" to develop the boundaries of the federal units and the constitutional principles according to which the powers and functions of the SPRs will be determined. The KwaZulu government proposes that a technical committee "in consultation with regional representatives (as they presently stand) and relevant experts" should delineate the relevant boundaries. There are no other specific suggestions from those favouring the bottom up process as to how the SPR boundaries should be established.

When a decision has been taken on the constitutional principles and the boundaries of the SPRs, the SPRs will become involved in the process. Suggestions as to how this should be achieved include the establishment of an MPNP at SPR level; decision making by "elective representativesâ\200\235; and the establishment of SPR constituent assemblies.

The IFP contends in its submissions to us that because of "the unique characteristics of the region of KwaZulu/Natal" it should be assumed to be a region and treated differently to other SPRs. According to its contention the organisation by the South African government of a referendum for the final ratification of the Constitution of the State of KwaZulu/Natal which was approved by the KwaZulu Legislative Assembly on December 1 1992 is

mandatory.

The government of KwaZulu does not advance such a contention in its written

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submissions to us. According to its proposals regional constituent assemblies should be elected to formulate constitutional proposals for their SPRs and these proposals should be the basis of negotiations in a reconstituted MPNP which "will be the main arena for the contestation of the various constitutional

proposals put forward..."

The next stage of such a process will be for the SPRs to formulate their proposals for their own constitutions and for a national constitution. The question as to how such decisions will be taken within the SPRs is not addressed in any of the proposals submitted to us. If the "bottom-up" process is adopted

this question will have to be addressed.

When each of the SPRs has finalised its proposals for its own constitution and for the national constitution, the focus of the negotiations will return to the national MPNP. At this stage the concern will be to co-ordinate the different proposals and to establish whether they can be accommodated in the national constitution. If there are differences between the proposals, those favouring the "bottom up" process support the view that the accommodation can be made on

an asymmetrical basis.

To facilitate the process it has been suggested that a committee or committees of experts or a commission be appointed to participate in the process at all levels.

Technical assistance could facilitate the work of the SPR constituent assemblies and a commission could have a useful role to play in co-ordinating the

submissions coming from the SPR's.

Most of the proposals call for a referendum at SPR level to approve the SPR constitutions as well as a referendum at national level to approve the national constitution. One of these proposals suggests that the SPR referenda and the national referendum be held at the same time, but the others favour the SPR

referenda being held before the national constitution is drawn up.

3.12 The proposals envisage a constitution making process which does not require any change in the present constitutional order until a new national constitution is adopted. This means that existing structures will remain in place until the new constitutions have been approved and enacted into law.

3.13 When the constitutions have been adopted, elections will be held under them for the national parliament and the SPR parliaments.

Developing the Process

4.1 Synthesis

4.1.1

4.1.2

The Negotiating Council has already established a Commission on the Demarcation/Delimitation of Regions and has asked us to formulate constitutional principles for debate and discussion by the Council, and to consider and report on the structures, powers and functions of SPR's.

On the basis of debates and discussions, including those that have already taken place, it should be possible for the Negotiating Council to take a decision on the constitutional principles, and when the Commission's report is received, to take a decision on the boundaries of the SPR units.

In dealing with the way in which SPRs will take decisions, and the suggestion that KwaZulu/Natal should be treated as a special case, it must be appreciated that the SPRs will not come into existence unless and until existing legislation is amended to make provision for the creation of new SPRs in accordance with decisions that may be taken by the MPNP. None of the boundaries of the TBVC states, the Self-governing Territories, or the Provinces, is likely to coincide with the boundaries of the SPRs.

Neither the boundaries nor the electorates of future SPR's are likely to coincide with those of existing bodies. In the circumstances, and although other possibilities may exist, it seems to us that the election of SPR constituent assemblies would be an appropriate way in which to determine the views of the electorate of the SPRs for the purposes of the "bottom up" process.

The question of levelling the playing fields for the purposes of the elections is addressed in only one of the submissions. According to that submission steps will have to be taken in order to enact a new electoral law, an independent broadcasting authority, a media watchdog, joint control of the security forces, the disbandment of private armies, etc.

This issue is not within our terms of reference but would have to be addressed if the bottom up process were to be followed.

Some of the proposals seem to contemplate that the MPNP will be obliged to accept decisions taken at SPR level as long as they are in accordance with the constitutional principles. Others accept that the MPNP will have the final say, and will not be bound by the SPR proposals which "would be nothing more than powerful popular petitions to the constitution-drafting process at central level." This question will have to be resolved if the bottom-up process is adopted.

Since SPR constitutions have to be co-ordinated with the national constitution it seems appropriate that the SPR referenda be held before the national constitution is finalised. The national constitution can then be put to a national referendum. If the national referendum fails to approve the constitution, the MPNP can continue the process, until the necessary approval by referendum is secured.

Responsibility for supervising the referenda would depend on decisions

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taken in regard to how the "playing fields should be levelled". One proposal is that a special commission be appointed to assume responsibility for such purposes, which would presumably include the supervision of the elections for regional constituent assemblies as well. This question is outside our terms of reference but as pointed out in

paragraph 4.1.4 will have to be addressed if this process is adopted.

Provision needs to be made for the possibility that the referenda at SPR level do not produce positive results in all SPRs. One proposal is that if an SPR constitution cannot be adopted within an established time frame, the solution must be found through negotiations as central level. This

issue needs to be resolved.

In one of the proposals it is suggested that the SPR proposals be debated within the MPNP, enlarged to include as a second chamber consisting of representatives from each of the SPR constituent assemblies, and that the approval of both chambers be required for decisions. Other proposals

contemplate that the MPNP will continue in its present form.

Scenario

On the basis of the synthesis in paragraph 4.1 the following could be a scenario

for a "bottom up" process.

4.2.1

4.2.2

423

MPNP resolves that there shall be a federal state.

MPNP decides upon constitutional principles for the federal state.

MPNP decides upon SPR boundaries after considering the report on the

Commission on Delimitation/Demarcation of Boundaries.

4.3

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4.2.6

4.2.7

4.2.8

4.2.9

The establishment of institutions for the levelling of the playing fields.

Each SPR elects a constituent assembly to formulate proposals for its

constitution and a national constitution.

Referenda are conducted at SPR level to secure approval of the proposals

for the SPR constitutions.

MPNP coordinates proposals for SPR constitutions and the national constitution, and finalises the national and SPR constitutions with the

assistance of a committee/commission.

The national constitution is submitted to a national referendum for

approval.

Elections are held for national and regional legislatures in accordance with the provisions of the approved constitutions, which mark the

termination of the present constitutional dispensation.

Questions to be resolved

To complete this scenario the following questions would have to be addressed by

the MPNP:

43.1

How will SPR constituent assemblies be elected and how will they take

their decisions?

4.3.2 What majority will be required for approval of the constitutions at the

SPR level and at national level?

4.3.3

43.4

43.5

4.3.6

4.3.7

What will the position be if the specified majorities are not obtained at SPR level?

How will the playing fields be levelled for the purposes of elections and

the referenda?

Should the MPNP remain as presently constituted or should it be converted into a bi-cameral body with representatives of the SPR

constituent assemblies constituting a federal council within the MPNP?

Will the MPNP be bound by decisions taken at SPR level or will the MPNP have the final say?

Should a special commission be appointed to oversee the process of

constitution making, elections and referenda?

Making a choice

2.1

5.2

In our view two of the issues which have given rise to the differences as to process, concern on the one hand the boundaries, powers, and functions of SPRs, and on the other, the question whether there should be SPR constitutions, and if there are, how their provisions should be determined. The matters raised in paragraphs 1.2 and 1.3 of the our instructions are relevant to these issues. In paragraph 6 below we explore further the equilibrium tentatively advanced in our Sixth Report, which could help to bridge the gap which still exists between the two processes.

We have indicated in our previous reports that a choice has to be made as to the constitution making process to be followed. In the light of this report and our previous reports the Negotiating Council should be in a

3.6.

position to address this crucial issue.

Possible equilibrium regarding the process of constitution making

6.1

6.1.1

612

Introduction

In our Sixth report we suggest a possible equilibrium between the conflicting approaches regarding constitution making on a basis which assumes the adoption by the MPNP of a constitution for the transitional period. We have been instructed to explore this possibility further. The greater clarity now offered of the establishment of SPR's and the participation of SPR representatives in the process could possibly provide

an acceptable equilibrium.

In paragraph 4.1 of our Sixth Report, it is suggested that, as a point of departure in finding an equilibrium between the two approaches, the constitutional principles pertaining to SPR autonomy currently under debate in the Council should be finalised. These constitutional principles indicate essential features of both the nature and form of a future South Africa. Not only is such a future state defined as a constitutional state in which the constitution shall have the character of the supreme law, but the form of state also emerges clearly as a decentralised one with regional autonomy. In fact, there is nothing in these principles which stands in the way of federalist aspirations. This coincides with the view previously expressed in paragraph 3.4 of our Second Report:

There is no universally accepted definition of federalism, and we

are not convinced that in a discussion on the form of state, it

would be useful or indeed possible to use as a point of departure

preconceived concepts such as unitary or federal states. We

6.2

should like to reiterate our view contained in our First Report that a more expeditious way of dealing with the matter of form of state would be to consider all those separate issues which have a

bearing on the form of state.

The importance of the Constitutional Principles

The question has been raised during the debates of the Negotiating Council whether these principles would be sufficiently binding on the processes of constitution making to ensure their application and actual implementation. It speaks for itself that were these principles simply to be regarded as useful guidelines during the different phases of constitution making, the relevant concerns would not be allayed. In this regard two interrelated matters must be considered, namely, first the binding force of the constitutional principles as a matter of law once they have been adopted by the MPNP; and second, their

actual implementation.

6.2.1 The legal force of the constitutional principles adopted by the MPNP

It will be necessary to imbue the constitutional principles with a legal force which will be binding on the constitution making body. (See also paragraph 4.1 of our Fifth Report). In other words, once adopted, these constitutional principles will not simply be directives or guidelines, but will form a justiciable basis of the mandate of the constitution making

body.

6.2.2 The practical application and implementation of the constitutional

principles

6.3.

In their present form the constitutional principles are stated as principles for a future democratic South Africa. Being stated as principles, they are not prescriptive in so far as their actual implementation is concerned. They bind the constitution making body, but leave it free within the limitations they impose to develop the precise terms and mechanisms of

the constitution.

Making provision for SPR constitutions

In view of the need for constitutional arrangements for SPR government and

administration immediately after the election of a constitution making body, and

the concern expressed that there should be SPR constitutions, a possible

equilibrium could be to include in the text of a constitution for the transitional

period, provisions for the following scenario:

6.3.1

6.3.2

At the time of the election of the constitution making body, legislatures can be elected simultaneously within each demarcated SPR. These legislatures could elect SPR executives for the period of the transition.

The administrative structures existing within the SPR's at the time of the election would continue to function under the political direction of the newly elected structures. Rationalisation and co-ordination of these structures where necessary, will be undertaken by the SPR governments in cooperation with the national government in terms of the Constitution

for the transitional period.

Provision could be made in the Constitution for the transitional period for the representation of SPRs in the constitution making body: this may be achieved in various ways, for instance, additional party lists in the

demarcated SPRs, the direct election of a second chamber or the

6.4

6.3.3

6.3.4

designation of members of the SPR legislatures to a second chamber.

The Constitution for the transitional period could provide for the establishment of a commission to interact with the constitution making body in a prescribed manner regarding the finalisation of the boundaries, authority, powers and functions of SPRs, including either uniform or

asymmetrical SPR constitutions.

Should an approach of this nature be agreed upon, the implementation of constitutional arrangements for a specific SPR during the transitional period may become practicable. It is conceivable that the elected legislatures of some or all of the SPRs would be capable of developing SPR constitutional arrangements before the constitution making body would be able to produce a new national constitution. These constitutional arrangements should be consistent with the constitutional principles and the Constitution for the period of transition and be in conformity with the new Constitution as it evolves in and is authorised

by the constitution making body.

Conclusion

A process of SPR constitution making along these lines could establish an

equilibrium between the different approaches to constitution making. SPR

constitutional dispensations are not left entirely in the hands of the national

constitution making body. Further, SPR dispensations and their implementation

may not necessarily be postponed until a final national constitution has been

adopted and implemented. The adoption of such a procedure for finding an

equilibrium between the two approaches, would require a somewhat detailed

regulation in the constitution for the transitional period of the procedures to be

followed by the constitution making body for the establishment, approval,

ratification and implementation for SPR dispensations.

THESE MINUTES ARE CONFIDENTIAL AND RESTRICTED TO MEMBERS OF THE AD HOC COMMITTEE ON THE INDEPENDENT ELECTORAL COMMISSION ACT, THE PLANNING COMMITTEE AND THE NEGOTIATING COUNCIL.

MINUTES OF THE MEETING OF THE AD HOC COMMITTEE ON THE INDEPENDENT ELECTORAL COMMISSION ACT HELD AT 13H10 ON WEDNESDAY 21 JULY 1993 AT THE WORLD TRADE CENTRE.

PRESENT: K Andrew
D Schutte
P Maduna
B Desai
SG Mothibe

M Hynd (Minutes)

The meeting commenced with the tabling of the brief received from the Planning Committee.
1 Brief
1.1 To recommend response to two letters received by the Planning Committee

1.2 To examine 5 Sections of the I E C Act, viz Sections 7, 16, 17, 18,3 and 21 which have not yet been agreed upon by the parties to the Negotiating Council.

2 Matters

Letters from the Technical Committee on IEC referred to the Ad Hoc Committee by the Planning Committee tabled:

2.1 With respect to the letter dated 14 July dealing with requests to make oral submissions to the Technical Committee, it was agreed that following written submissions, oral evidence would be permissable where such oral representation was at the request of the Technical Committee as previously agreed by the Negotiating Council.

2.2 A new Electoral Act: an invitation for submissions in this regard has already been made to delegations to the Negotiating Council. The question has arisen whether interested parties outside of the Negotiating Council be invited to make

representations in this regard.

In this regard there is a need to confirm or otherwise that the IEC Technical Committee has been mandated to draw up a new Electoral Act.

2.3 IEC Act Sections 7, 16, 17, 18,3 & 21
Section 7 : Issue of participation of international members. Following discussion it was agreed that within the time period permitted the Committee was unable to examine and discuss thoroughly the issues before it in order to make recommendations.
The Committee will examine the points before it, but more time is requested in which to discuss these matters in order to reach consensus.
In conclusion it was agreed that if it was confirmed that the Technical Committee had been requested to draft the said New Electoral Act, then the Negotiating Council should invite outside parties to make submissions if they wish to do so.
3 Meeting Schedule
It was agreed that the Committee would meet again on Tuesday 27 July at 08h00 and during the Negotiating Council lunch recess.
4 Closure

The meeting was closed at 14h05

These minutes were ratified at the 08h10 meeting of the Ad Hoc Committee on the Independent Electoral

Commission Act

CHAIRPERSON

Annexure

of 27 July 1993 and the amended version signed by the Chairperson of the original meeting

PLANCOMM/SUBCOMM/MIN2107
12 November 1998

PLANCOMM/SUBCOMM/MIN2107
12 November 1998

4 August 1993

The nature and extent of the involvement of the international community in the structures and work of the Independent Electoral Commission and its directorates is a complex issue. Decisions made in this regard may be premature or unworkable if the attitude of the international community has not been ascertained in advance.

It is therefore recommended that the Planning Committee and/or the I.E.C. Technical Committee hold discussions with representatives of the United Nations, the Organisation of African Unity, the European Community and the Commonwealth to ascertain under what conditions and to what extent they are willing and able to become involved.

After this information has been obtained, discussions should be held leading to decisions as to the provisions that should be made in the I.E.C. Bill in respect of the involvement of the international community.